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11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**

13
14 **CROSSFIT, INC., et al.**

15 Plaintiff,

16 v.

17 **JENNI ALVIES, an individual; and ROES**
18 **1-10,**

19 Defendants.

20 Case No. 4:13-cv-03771-KAW

21 **DEFENDANT JENNI ALVIES'**
22 **ANSWER TO COMPLAINT AND**
23 **COUNTERCLAIM**

Defendant Jenni Alvies, in answer to the Complaint of Plaintiff CrossFit, Inc., here admits, denies, and avers as follows:

NATURE OF THE ACTION

1. The allegations in Paragraph 1 are prefatory, contain legal verbiage, and call for a conclusion of law to which no response is required. To the extent that a response is required, Defendant denies the allegations in Paragraph 1.

JURISDICTION AND VENUE

2. The allegations in Paragraph 2 are prefatory, contain legal verbiage, and call for a conclusion of law to which no response is required. To the extent that a response is required, Defendant denies the allegations in Paragraph 2.

3. Defendant admits the allegations in Paragraph 3.

4. Defendant admits the allegations in Paragraph 4.

THE PARTIES

5. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5, and on that basis, Defendant denies the allegations in Paragraph 5.

6. Defendant admits the allegations in Paragraph 6.

7. Defendant denies the allegations in Paragraph 7.

8. Defendant denies the allegations in Paragraph 8.

CROSSFIT'S INTELLECTUAL PROPERTY RIGHTS

9. Defendant denies the allegations in Paragraph 9.

10. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 10, and on that basis, Defendant denies the allegations in Paragraph 10.

11. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 11, and on that basis, Defendant denies the allegations in Paragraph 11.

12. Defendant denies the allegations in Paragraph 12.

DEFENDANTS' WILLFUL INFRINGEMENT

13. Defendant admits the allegations in Paragraph 13.

3 14. Defendant admits the pictured tank tops were advertised for sale on her
4 blog at certain times. Except as expressly admitted, Defendant denies the allegations in
5 Paragraph 14.

15. Defendant denies the allegations in Paragraph 15.

16. Defendant admits the allegations in Paragraph 16.

8 17. Defendant admits that, beginning in May 2013, CrossFit's representatives
9 continually contacted and harassed her and made demands that, among other things,
10 she cancel her blog and stop selling products. Except as expressly admitted, Defendant
11 denies the allegations in Paragraph 17.

12 18. Defendant denies that she has ever used the "CrossFit Marks." Except as
13 expressly denied, Defendant admits in Paragraph 18.

19. Defendant denies the allegations in Paragraph 19.

20. Defendant denies the allegations in Paragraph 20.

21. Defendant denies the allegations in Paragraph 21.

17 22. Defendant admits that she has been the registered owner of the domains
18 <crossfitmamas.com> and <cfmamas.com>. Except as expressly admitted, Defendant
19 denies the allegations in Paragraph 22.

23. Defendant denies the allegations in Paragraph 23.

21 24. Defendant admits that she registered the Facebook page located at
22 <https://www.facebook.com/cfmamas.com>. Except as expressly admitted, Defendant
23 denies the allegations in Paragraph 24.

25. Defendant denies the allegations in Paragraph 25.

26. Defendant denies the allegations in Paragraph 26.

26 27. Defendant admits that, pursuant to the relentless demands of Plaintiff, she
27 changed her blog name to “HIIT Mamas.” Except as expressly admitted, Defendant
28 denies the allegations in Paragraph 27.

28. Defendant denies the allegations in Paragraph 28.
 29. Defendant denies the allegations in Paragraph 29.
 30. Defendant denies the allegations in Paragraph 30.
 31. Defendant denies the allegations in Paragraph 31.
 32. Defendant denies the allegations in Paragraph 32.
 33. Defendant denies the allegations in Paragraph 33.
 34. Defendant denies the allegations in Paragraph 34.
 35. Defendant denies the allegations in Paragraph 35.
 36. Defendant denies the allegations in Paragraph 36.
 37. Defendant denies the allegations in Paragraph 37.
 38. Defendant denies the allegations in Paragraph 38.
 39. Defendant denies the allegations in Paragraph 39.
 40. Defendant denies the allegations in Paragraph 40.

FIRST CLAIM
Trademark Infringement (15 U.S.C. § 1114)
(Against All Defendants)

41. Defendant incorporates the preceding admissions and denials as though fully set forth herein.
 42. The allegations in Paragraph 42 are prefatory, contain legal verbiage, and call for a conclusion of law to which no response is required. To the extent that a response is required, Defendant denies the allegations in Paragraph 42.
 43. Defendant denies the allegations in Paragraph 43.
 44. Defendant denies the allegations in Paragraph 44.
 45. Defendant denies the allegations in Paragraph 45.
 46. Defendant denies the allegations in Paragraph 46.
 47. Defendant denies the allegations in Paragraph 47.
 48. Defendant denies the allegations in Paragraph 48.
 49. Defendant denies the allegations in Paragraph 49.

SECOND CLAIM
False Designation of Origin (15 U.S.C. § 1125(a))
(Against All Defendants)

50. Defendant incorporates the preceding admissions and denials as though fully set forth herein.

51. Defendant denies the allegations in Paragraph 51.

52. Defendant denies the allegations in Paragraph 52.

53. Defendant denies the allegations in Paragraph 53.

54. Defendant denies the allegations in Paragraph 54.

THIRD CLAIM
Trademark Dilution (15 U.S.C. § 1125(c))
(Against All Defendants)

55. Defendant incorporates the preceding admissions and denials as though fully set forth herein.

56. The allegations in Paragraph 56 are prefatory, contain legal verbiage, and call for a conclusion of law to which no response is required. To the extent that a response is required, Defendant denies the allegations in Paragraph 56.

57. Defendant denies the allegations in Paragraph 57.

58. Defendant denies the allegations in Paragraph 58.

59. Defendant denies the allegations in Paragraph 59.

60. Defendant denies the allegations in Paragraph 60.

61. Defendant denies the allegations in Paragraph 61.

62. Defendant denies the allegations in Paragraph 62.

63. Defendant denies the allegations in Paragraph 63.

**FOURTH CLAIM
Cyberpiracy
(Against All Defendants)**

64. Defendant incorporates the preceding admissions and denials as though fully set forth herein.

1 65. The allegations in Paragraph 65 are prefatory, contain legal verbiage, and
2 call for a conclusion of law to which no response is required. To the extent that a
3 response is required, Defendant denies the allegations in Paragraph 65.

4 66. Defendant admits that she has registered the domain names
5 <crossfitmamas.com>, <cfmamas.com>, and <califitmamas.com>. Except as expressly
6 admitted, Defendant denies the allegations in Paragraph 66.

7 67. Defendant denies the allegations in Paragraph 67.

8 68. Defendant denies the allegations in Paragraph 68.

9 69. Defendant denies the allegations in Paragraph 69.

10 ||| 70. Defendant denies the allegations in Paragraph 70.

11 ||| 71. Defendant denies the allegations in Paragraph 71.

12 ||| 72. Defendant denies the allegations in Paragraph 72.

13 ||| 73. Defendant denies the allegations in Paragraph 73.

AFFIRMATIVE DEFENSES

Defendant sets forth below her affirmative defenses. Each defense is asserted as to all causes of action unless otherwise noted. By setting forth these affirmative defenses, Defendant does not assume the burden of proving any fact, issue, or element of a cause of action where such burden properly belongs to Plaintiff. Moreover, nothing stated herein is intended or shall be construed as an acknowledgement that any particular issue or subject matter is relevant to Plaintiff' allegations.

FIRST AFFIRMATIVE DEFENSE

(Failure to State Cause of Action)

24 As Defendant's First Affirmative Defense, Defendant asserts that Plaintiff has
25 failed to state a cause of action against Defendant upon which relief may be granted.
26 Plaintiff has failed to plead the prima facie elements of its asserted causes of action.

27 //

28 //

SECOND AFFIRMATIVE DEFENSE

(Failure to Mitigate)

As Defendant's Second Affirmative Defense, Defendant asserts that Plaintiff's claims are barred, in whole or in part, because Plaintiff failed to use ordinary care and diligence to take all necessary steps to mitigate and minimize any damages Plaintiff claims to have sustained and for which it seeks recovery in this action.

THIRD AFFIRMATIVE DEFENSE

(Contribution)

As Defendant's Third Affirmative Defense, Defendant asserts that the acts and omissions alleged in the Complaint, as well as the damages and harms alleged therein, which are expressly denied, were caused and/or contributed to by the acts and omissions of third parties over which Defendant had no control or any duty to control.

FOURTH AFFIRMATIVE DEFENSE

(Setoff and/or Counterclaim)

As Defendant's Fourth Affirmative Defense, Defendant asserts that the damages and harms alleged in the Complaint, which are expressly denied, are barred in whole or in part by the principles of setoff and/or counterclaim.

FIFTH AFFIRMATIVE DEFENSE

(Unclean Hands)

As Defendant's Fifth Affirmative Defense, Defendant asserts that Plaintiff's claims are barred in whole or in part by the doctrine of unclean hands due to Plaintiff's fraudulent, unethical and/or illegal conduct with relation to the subject of this action.

SIXTH AFFIRMATIVE DEFENSE

(Acquiescence)

As Defendant's Sixth Affirmative Defense, Defendant asserts that Plaintiff's claims are barred in whole or in part by Plaintiff's affirmative conduct, which amounted to an assurance to Defendant that Plaintiff would not pursue the claims alleged.

11

SEVENTH AFFIRMATIVE DEFENSE

(Waiver and Estoppel)

As Defendant's Seventh Affirmative Defense, Defendant asserts that Plaintiff waived any claim or cause of action against Defendant for the acts alleged in the Complaint, and Plaintiff should be estopped from bringing this lawsuit.

EIGHTH AFFIRMATIVE DEFENSE

(Laches)

As Defendant's Eighth Affirmative Defense, Defendant asserts that Plaintiff's claims are barred, in whole or in part, by the doctrine of laches. Plaintiff knew, or should have known, of the acts of which it now complains well before the initiation of this lawsuit. Despite this knowledge, Plaintiff engaged in an unreasonable delay in taking any legal action.

NINTH AFFIRMATIVE DEFENSE

(Invalidity of Trademark or Trade Name)

As Defendant's Ninth Affirmative Defense, Defendant asserts that Plaintiff's claims are barred, in whole or in part, because the trademarks and/or trade names alleged in the Complaint are invalid, unenforceable, void, or voidable for failure to comply with one or more of the provisions of the Lanham Act, 15 U.S.C., § 1051 et seq.

TENTH AFFIRMATIVE DEFENSE

(No Likelihood of Confusion)

As Defendant's Tenth Affirmative Defense, Defendant asserts that, to the extent the alleged trademarks exist and belong to Plaintiff, which Defendant expressly denies, any use thereof by Defendant was not likely to cause confusion, mistake, or to deceive. Defendant is not using any claimed trademark and/or trade name of Plaintiff in commerce in connection with the sale, offering for sale, distribution or advertising of any goods on or in connection with which such use is likely to cause confusion or mistake or likely to deceive.

11

ELEVENTH AFFIRMATIVE DEFENSE

(Fair Use)

As Defendant's Eleventh Affirmative Defense, Defendant asserts that, to the extent that Defendant engaged in any conduct that could be construed as infringement on Plaintiff' trademarks or trade names, Defendant's actions constituted a fair use.

TWELFTH AFFIRMATIVE DEFENSE

(Consent/Licensee)

As Defendant's Twelfth Affirmative Defense, Defendant asserts that, to the extent that Defendant engaged in any conduct that could be construed as infringement on Plaintiff' trademarks or trade names, Defendant did so with the consent of Plaintiff.

ADDITIONAL AFFIRMATIVE DEFENSES

Defendant hereby give notice that they intend to rely on any additional affirmative defenses that become available or apparent during discovery and thus reserve the right to amend her answer to assert such additional affirmative defenses.

PRAYER FOR RELIEF

WHEREFORE, having fully answered Plaintiff's Complaint, Defendant prays that judgment be rendered in her favor and that Plaintiff take nothing on its claims, that Plaintiff's claims, and each of them, be dismissed in their entirety with prejudice, and that costs and attorneys' fees be awarded to Defendant.

COUNTERCLAIM

Counterclaimant Jenni Alvies ("Alvies"), by and through her undersigned attorneys, alleges as follows:

INTRODUCTION

1. In this, the Information Age, the term “cyberbullying” has been coined to refer to the use of electronic media to publically intimidate or threaten others. While many may associate cyberbullies with teenagers who have taken their schoolyard taunts to Twitter and Facebook, the corporate sphere contains its own cyberbullies.

1 2. Counter-Defendant CrossFit, Inc. (“CrossFit”) is a corporate cyberbully.
2 CrossFit routinely uses electronic media, its in-house legal team, and paid legal counsel
3 to harass, intimidate and annoy comparably helpless fitness bloggers and others by
4 threatening (and taking) legal action against said bloggers unless they submit entirely to
5 CrossFit’s unreasonable demands to take down their blogs, enter into draconian
6 settlement agreements or stipulated judgments, and otherwise forfeit their rights.

7 3. CrossFit’s filing of its complaint for various Lanham Act claims against
8 Alvies is just the latest in a series of aggressive, abusive, and unlawful attempts by
9 CrossFit to bully a fitness blogger and eliminate its competition.

10 4. Although CrossFit asserts its Complaint is filed in support of its existing
11 trademark rights, the truth is that CrossFit is seeking to eliminate potential problems for
12 trademark applications it hopes to get approved in the future. Such conduct constitutes,
13 among other things, a violation of the Lanham Act, an unlawful and deceptive business
14 practice, and an abuse of process.

15 5. CrossFit also routinely abuses and violates the Copyright Act by sending
16 so-called “takedown notices” pursuant to the Digital Millennium Copyright Act that are not
17 based on any copyright rights, but rather an assertion of trademark rights.

18 6. Since January 2013, and as of the date of this Cross-Complaint, CrossFit
19 has filed over 20 federal lawsuits that are nearly identical to the claims asserted against
20 Alvies—a number that increases on a near-weekly basis.

21 7. There is a fine line between aggressively defending one’s intellectual
22 property rights and unlawful attempts to enforce “rights” one does not have, thereby
23 infringing on the rights of others. Through the instant action and others, CrossFit has
24 undoubtedly crossed that line.

25 8. Through this counterclaim, Alvies now seeks relief, including declaratory
26 relief, establishing the boundary between CrossFit’s trademark rights and her own.

27 9. CrossFit has filed a Complaint against Alvies for certain causes of action
28 alleged to have arisen out of CrossFit’s trademark rights and other rights as stated in that

1 pleading. Alvies has answered the Complaint and denies all liability thereunder. The
2 Complaint is referred to and incorporated herein only as a restatement of the allegations
3 from which this Counterclaim arises, and not as an admission of the truth or merit of any
4 of the allegations in the Complaint, nor as an admission of any liability thereunder.

5 **THE PARTIES**

6 10. Defendant and Counterclaimant Jenni Alvies is an individual residing in
7 Brentwood, California.

8 11. At all relevant times, Plaintiff and Counter-Defendant CrossFit, Inc. is and
9 was a corporation formed under the laws of the State of Delaware. On information and
10 belief, CrossFit maintains its principal place of business in Washington, D.C. On
11 information and belief, CrossFit has affiliates located throughout the State of California
12 and thereby conducts business throughout California.

13 12. The true names of Counter-defendants sued herein under the fictitious
14 names ROES 1 through 10 are unknown to Alvies, and Alvies will seek leave of Court to
15 amend this Counterclaim to allege such names as soon as they are ascertained and/or
16 confirmed. All references in this Counterclaim to any of the Counter-defendants shall
17 also include all of them, unless otherwise specified.

18 13. As alleged herein, at all relevant times, CrossFit and ROES 1 through 10,
19 and each of them, were the agents, servants, and employees of each other, and in doing
20 the things hereinafter alleged, were acting in the scope of their authority as agents,
21 servants, and employees and with the permission, consent, authorization, and ratification
22 of each other.

23 **JURISDICTION AND VENUE**

24 14. This Court has subject matter jurisdiction over this Counterclaim under 28
25 U.S.C. §§1131 and 1338 for Alvies' claims arising under the Declaratory Judgment Act,
26 28 U.S.C. § 2201 et seq., the Lanham Act, 15 U.S.C. § 1125(a), and the Copyright Act,
27 17 U.S.C. § 501 et seq. This Court has supplemental jurisdiction over Alvies' remaining
28 claims under 28 U.S.C. § 1367.

15. Venue is proper under 28 U.S.C. § 1391.

2 16. This Court has personal jurisdiction over CrossFit because CrossFit has
3 submitted to the Court for purposes of this dispute by filing its Complaint. In addition,
4 CrossFit has done substantial and continuous business with California residents, and
5 CrossFit has purposefully directed substantial and pervasive activities at the residents of
6 California such that CrossFit can and should reasonably expect to be haled into the
7 Courts of California.

FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS

Alvies' Blog

17. Alvies is the wife of a fireman and a stay-at-home mother of four children.

11 18. After the birth of her fourth child, Alvies sought to get in shape, and was
12 introduced to high-intensity interval or cross-fitness training by her husband, who
13 engaged in such workouts at work.

14 19. Alvies did not initially have the physical stamina or time to complete the
15 high-intensity workouts or access to the gym equipment necessary to perform some of
16 the exercises—such as a rope for climbing. Accordingly, Alvies began writing her own
17 modified workouts to accommodate the strength level, resources, and lifestyle of a busy
18 mom.

19 20. As often happens in these situations, once Alvies' friends and family
20 noticed a difference in her appearance and fitness level, they asked for her secret.
21 Alvies began texting her personalized daily workout to these friends, and eventually one
22 of them suggested she post them to a blog instead.

23 21. On this suggestion, Alvies launched her blog (“the Blog”) in or around April
24 2011 at <crossfitmamas.blogspot.com>. Readership for the Blog quickly grew, and
25 through it Alvies has undoubtedly introduced thousands of women to high-intensity
26 interval training. Readers of the Blog use the comments section to post and track their
27 personal progress on certain exercises.

28 //

1 22. Posting daily routines and other information to the Blog requires substantial
2 time and effort on Alvies' part. Although she has added Google AdWords advertising
3 and a link to purchase vitamin meal-replacement shakes in an effort to recoup some
4 money in exchange for such efforts, these endeavors have not been very profitable.
5 Alvies has never viewed the Blog as a business but rather a labor of love, and once the
6 value of her time spent generating content for and managing the Blog is taken into
7 consideration, it is clear she is operating it at a substantial loss.

8 **CrossFits' Trademarks (and Lack Thereof)**

9 23. CrossFit is the registered owner of the trademark CROSSFIT, U.S. Patent
10 and Trademark Office ("USPTO") Registration No. 3007458, for International Class 041,
11 "Fitness Training."

12 24. CrossFit has also filed several trademark applications for other uses of
13 CROSSFIT. Such applications have been filed, and as of the date of this Counterclaim
14 are still filed, on an "intent-to-use" basis, meaning that CrossFit admits that it has not yet
15 used the mark in commerce, and that the USPTO has not yet reviewed or granted the
16 application (collectively, the "Intent-to-Use Applications"). Examples of the Intent-to-Use
17 Applications include those for energy bars and meal replacement drinks (USPTO Ser.
18 No. 85792895), weight loss equipment (USPTO Ser. No. 85936449), magazines and
19 books (USPTO Ser. No. 85792892), sports bags (USPTO Ser. No. 85629318), and
20 computer software to track workouts (USPTO Ser. No. 77719836).

21 25. CrossFit does not own a registered trademark, and has not filed a
22 trademark application for any of the following marks referenced in the Complaint:

- 23 a. CF
24 b. CF Mamas or CFMamas
25 c. Califit Mamas or CalifitMamas.

26 //

27 //

28 //

1 **CrossFit's Unlawful and Abusive Efforts to Eliminate Existing Uses in Commerce**
2 **of Certain Marks in an Effort to Improve CrossFit's Ability to Successfully Register**
3 **the Marks That Are the Subject of the Intent-to-Use Applications**

4 26. Several of the Intent-to-Use Applications were filed as late as December
5 2012.

6 27. Beginning a few weeks later, in January 2013, CrossFit, with the assistance
7 of ROES 1 through 10, began filing federal lawsuits alleging infringement of CrossFit's
8 trademarks, akin to the allegations in the Complaint. On information and belief,
9 CrossFit's purpose in filing these lawsuits, at least in part, is not to protect its existing
10 marks, but to eliminate potentially competing or confusing uses of the marks at issue in
11 the Intent-to-Use Applications. In other words, under the pretense of invoking the
12 Lanham Act, CrossFit seeks to eliminate competition in markets it has not even entered
13 yet.

14 28. According to PACER, CrossFit, with the assistance of ROES 1 through 10,
15 has filed over 20 federal lawsuits since January 1, 2013. By comparison, CrossFit filed
16 only 3 federal lawsuits in 2012.

17 29. On information and belief, in addition to filing the aforementioned lawsuits,
18 CrossFit, with the assistance of ROES 1 through 10, has issued hundreds of cease-and-
19 desist letters to Internet bloggers, website owners, and others demanding that they
20 delete or otherwise disable their blogs and websites or face costly legal action.

21 30. On information and belief, in addition to filing the aforementioned lawsuits
22 and issuing the aforementioned cease-and-desist letters, CrossFit, with the assistance of
23 ROES 1 through 10, has secured the removal of blogs, websites, Facebook pages, and
24 other media by issuing so-called "takedown notices" to the hosts of said media,
25 purportedly pursuant to the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512.

26 31. In order to qualify for "safe harbor" under the DMCA, Internet hosts must
27 remove content that infringes the issuer's copyright upon receipt of a DMCA takedown
28 notice. The DMCA does not address trademark infringement.

32. On information and belief, CrossFit's DMCA takedown notices have been

1 improper in that they have been based on alleged trademark infringement, rather than
2 copyright infringement.

3 33. On information and belief, CrossFit, ROES 1 through 10, and each of them,
4 are legally sophisticated parties who know that the demands they have made in the
5 lawsuits, the cease-and-desist letters, and the DMCA takedown notices exceed the
6 bounds of the Lanham Act, the DMCA, and CrossFit's rights in general.

7 34. By contrast, on information and belief, the defendants to the lawsuits and
8 other persons and entities affected by the lawsuits, the cease-and-desist letters, and the
9 DMCA takedown notices are unsophisticated parties without sufficient legal background
10 (or financial ability to retain qualified legal representation) to know that CrossFit's
11 demands are excessive, abusive, and unsupported by the law.

12 35. On information and belief, CrossFit, ROES 1 through 10, and each of them,
13 have exploited the foregoing imbalance of sophistication and legal background to
14 convince the unsophisticated parties to voluntarily delete their websites and blogs, and to
15 enter into draconian settlement agreements and/or stipulated judgments, all of which
16 serve to pave the way for CrossFit's future market domination for the goods and services
17 contemplated in the Intent-to-Use Applications.

CrossFit's Harrassment of Alvies

19 36. On May 9, 2013—over two years after the Blog was started—Alvies was
20 contacted by Esther Dohl (“Dohl”)¹, who identified herself as an in-house paralegal for
21 CrossFit.

22 37. On information and belief, at all times relevant, Dohl was acting as an
23 agent, representative, and/or employee of CrossFit, and was acting within the scope of
24 such agency and/or employment.

25 38. Dohl demanded that Alvies immediately stop using the CrossFit name on
26 the Blog and her affiliated Facebook page. This demand took Alvies by surprise as she
27 had been operating the Blog for several years without any such demand by CrossFit, and

²⁸ ¹ If warranted by initial discovery, Alvies will amend this Counterclaim to name Dohl as a ROE defendant.

1 she did not believe the Blog to be infringing in any respect. Regardless, Alvies attempted
2 to work with Dohl to satisfy CrossFit's demands, only to be continually berated by Dohl.

3 39. Alvies worked with Dohl to reach an agreement that Alvies would move the
4 Blog to the domains <califitmamas.com> and <califitmamas.blogspot.com>.

5 40. The overall tenor of Dohl's communications with Alvies can be summarized
6 as unprofessional at best and bullying at worst. For example, when Alvies notified Dohl
7 that a domain they had previously agreed upon as appropriate for the Blog,
8 <califitmamas.blogspot.com>, had become unavailable, Dohl responded, by email:

9 *You are obviously trying VERY VERY VERY hard to piggy back on the*
10 *CrossFit name. Please stop. I'm glad someone stole*
11 *http://califitmamas.blogspot.com/ because now you have an experience of*
12 *what it is for someone to steal your name. Get your own ideas and name*
13 *or legally become part of the CrossFit community. Until then, you are*
14 *trademark leech.*

15 41. Dohl also attempted to exploit Alvies' unfamiliarity with trademark law by
16 grossly exaggerating CrossFit's rights. For example, Dohl has made the ridiculous
17 assertion that CrossFit owns the rights to the initials "CF":

18 *Yes CF can stand for anything. But in the context of trademark*
19 *infringement, trademark law takes into consideration likelihood of*
20 *confusion of one brand with another. CROSSFIT is a registered*
21 *trademark in the class of health and fitness services (Class 41). A*
22 *common abbreviation for CrossFit and reference to CrossFit is "CF."* A
23 *federal judge will not allow that you direct all your "CrossFit Mamas"*
24 *clientele to a new website blog labeled "CFMamas."* Calling you [sic] blog
25 *CFMamas will be actionable. In other words, we will sue you.*

26 42. Dohl has also communicated with several third parties regarding Alvies and
27 has made false statements therein about her communications with Alvies, claiming they
28 took place with a frequency they did not, or that Alvies flatly "refused" to meet certain
demands. In these third-party communications, Dohl further states that Alvies' workouts
were analyzed by an expert and found to be unprofessional, stupid, and unsafe. For
example, Dohl sent the following in an email to a third party reader of the Blog:

29 *[Alvies] doesn't have the knowledge of programming. I have about 7*
30 *years of CrossFit experience, and 4 years of CrossFit Training experience.*

1 *I quickly scanned her blog and assessed a few days of her workouts and
2 thought "that is bad programming." And I sent links to her blog to other,
3 more experienced trainers to see what they thought of the workouts. I
4 received this response from someone with over ten years of CrossFit
5 training/programming experience:*

6 *"I will look further today but first thing I see is 5/31 60 deads and 60
7 snatches three days later 50 swings followed by more deads the next day.
8 Without even looking at the workout structure that looks stupid and
9 unsafe. A great deal of explosively opening of the hips with a tired lower
10 back."²*

11 43. Alvies' workouts are not bad or unsafe.

12 44. As admitted in Paragraph 24 of the Complaint, CrossFit has also sent legal
13 demands to third parties, including Facebook, for removal of the Blog and Alvies'
14 Facebook Page.

15 45. On information and belief, CrossFit, with the assistance of ROES 1 through
16 10, sent a DMCA takedown notice to Facebook, which resulted in suspension of Alvies'
17 Facebook page. On information and belief, the DMCA takedown notice improperly
18 asserted for the protection of trademark rights.

19 46. Through substantial effort by Alvies, and based on her agreement with
20 CrossFit, as reached through Dohl, Alvies moved the entire Blog to <califitmamas.com.>

21 47. Despite the fact that Alvies complied with CrossFit's demands, CrossFit
22 continued its harassment of Alvies, repeatedly demanding that she disable her Google
23 AdWords and stop selling the vitamin meal-replacement shakes.

24 48. Eventually, CrossFit, through its legal counsel,³ informed Alvies that it
25 disagreed with Dohl's representation that <califitmamas.com> was an acceptable domain
26 for the Blog. Accordingly, after additional harassment, Alvies moved the Blog a second
27 time to <hiitmamas.blogspot.com>.

28

² If warranted by initial discovery, Alvies will amend this Counterclaim to name the author of this statement as a ROE defendant.

³ CrossFit's legal counsel has participated in and directed other harassment of Alvies, including the purchase of a tank top under false and deceptive pretenses (see Complaint ¶ 19). If warranted by initial discovery, Alvies will amend this Counterclaim to name CrossFit's counsel, and other participants in the tank top purchase, as ROE defendants.

1 49. Even after this second move, CrossFit, through its legal counsel, continued
2 to harass Alvies, repeatedly demanding that she, among other things, (a) delete nearly
3 two and a half years of posts on the Blog (including the reader workout records
4 maintained in the comments) and “start over,” and (2) stop selling the vitamin meal-
5 replacement shakes.

6 50. On information and belief, CrossFit's incessant demands that Alvies delete
7 the Blog in its entirety and stop selling the vitamin meal-replacement shakes is an
8 improper effort to eradicate all Internet evidence of Alvies' prior use in commerce of
9 marks subject to the Intent-to-Use Applications regarding meal-replacement shakes,
10 computer software to track workouts, and others.

FIRST CAUSE OF ACTION

(Declaratory Judgment Against CrossFit)

13 51. Alvies restates and incorporates the allegations set forth above in
14 Paragraphs 1 through 49 as though fully rewritten herein.

15 52. Alvies asserts this first cause of action for declaratory judgment of issues
16 arising out of federal trademark and copyright law.

17 53. A present and actual controversy exists between the parties regarding the
18 intellectual property rights of CrossFit.

19 54. Alvies now seeks a declaratory judgment from this Court that CrossFit does
20 not have a registered or common-law trademark in any of the following marks or
21 permutations thereof:

- a. CF
 - b. CF Mamas or CFMamas
 - c. Califit Mamas or CalifitMamas.

25 55. Alvies now seeks a declaratory judgment from this Court that the following
26 marks, or permutations thereof, do not create a likelihood of consumer confusion with
27 CrossFit's rights in CROSSFIT:

- a. CF

- b. CF Mamas or CFMamas
 - c. Califit Mamas or CalifitMamas.

3 56. Alvies now seeks a declaratory judgment from this Court that CrossFit is
4 estopped from asserting trademark infringement claims against Alvies regarding her use
5 of the following marks, or permutations thereof, because CrossFit initially agreed that
6 Alvies could use such marks:

- a. Califit Mamas or CalifitMamas.

8 57. Alvies now seeks a declaratory judgment from this Court that CrossFit, and
9 ROES 1 through 10, improperly issued DMCA takedown notices, which affected Alvies,
10 based on an assertion of trademark rights.

11 58. Alvies now seeks a declaratory judgment from this Court that CrossFit, and
12 ROES 1 through 10, violated 17 U.S.C. § 512(f) by knowingly and materially
13 misrepresenting in the DMCA takedown notices concerning Alvies that material or activity
14 was infringing of any copyright, or by otherwise knowingly and materially abusing the
15 DMCA takedown process, and as such, that CrossFit, and ROES 1 through 10, are liable
16 for Alvies' damages, including costs and attorneys' fees.

SECOND CAUSE OF ACTION

**(Violation of the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200,
Against All Counter-Defendants)**

20 59. Alvies incorporates the allegations set forth above in Paragraphs 1 through
21 49 as though fully rewritten herein.

22 60. Alvies asserts this Second Cause of Action for violation of California's
23 Unfair Competition Law.

24 61. CrossFit, ROES 1 through 10, and each of them have engaged in a pattern
25 of harassing conduct directed at Alvies wherein they have sought to cause the Blog and
26 Alvies' Facebook page to be permanently deleted, and for Alvies to stop selling vitamin
27 meal-replacement shakes in an improper effort to eradicate all Internet evidence of
28 Alvies' prior use in commerce of marks subject to the Intent-to-Use Applications

1 regarding meal-replacement shakes, computer software to track workouts, and others,
2 and to eliminate competition by Alvies.

3 62. Counter-defendants' above-described misconduct is a fraudulent business
4 practice as that term is used in Business and Professions Code section 17200 because a
5 reasonable person would have been deceived by the representations and material
6 omissions by Counter-defendants concerning CrossFit's intellectual property rights. For
7 example, Alvies is informed and believes that Facebook was deceived by the
8 representations and omissions by Counter-defendants in CrossFit's DMCA takedown
9 notice concerning Alvies' Facebook page and, in reliance thereon, disabled Alvies'
10 Facebook page. As another example, Counter-defendants are engaged in an ongoing
11 fraud on the Trademark Office by attempting to eradicate evidence of existing uses of the
12 marks subject to the Intent-to-Use Applications.

13 63. Counter-defendants' above-described misconduct is an unfair business
14 practice, as that term is used in Business and Professions Code section 17200, because
15 Counter-defendants' conduct offends established public policies, including policies
16 arising out of state and federal antitrust laws, and is immoral, unethical, oppressive,
17 unscrupulous and substantially injurious to the victims of Counter-defendants' conduct.

18 64. Counter-defendants' above-described misconduct is an unlawful business
19 practice, as that term is used in Business and Professions Code section 17200, because
20 Counter-defendants' conduct violates 17 U.S.C. § 512(f), the Lanham Act, the Trademark
21 Act, and state and federal antitrust laws.

22 65. By carrying out the above-described misconduct, Counter-defendants
23 engaged in unlawful, unfair, and fraudulent business practices in violation of California
24 Business and Professions Code section 17200.

25 66. As a result of Counter-defendants' misconduct, Alvies has been harmed.

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THIRD CAUSE OF ACTION

**(False Advertising Under the Lanham Act, 15 U.S.C. § 1125,
Against All Counter-Defendants)**

67. Alvies asserts this Third Cause of Action for false advertising in the alternative to her affirmative defenses asserted in her Answer to the Complaint.

68. In its Complaint, CrossFit alleges that Alvies and CrossFit are engaged in businesses so similar that the use of similar marks by each is likely to cause consumer confusion, deception, and mistake as to the affiliation, connection, or association of Alvies or the Blog with CrossFit, and as to whether the goods and services offered on the Blog originate from, or are sponsored or approved by, Alvies. In other words, CrossFit alleges that Alvies and CrossFit are business competitors.

69. CrossFit has made false and misleading representations of fact to consumers—namely, readers of the Blog—regarding Alvies' goods and services in violation of 15 U.S.C. § 1125(a). For example, CrossFit, through its agents, representatives, and employees, has falsely stated to readers of the Blog, under the guise of expert authority, that Alvies' workouts are “bad,” “stupid,” or “unsafe.”

70. CrossFit's acts have caused and, unless enjoined by this Court, will continue to cause a likelihood of confusion and deception among consumers and irreparably injure Alvies' goodwill and reputation, for which Alvies has no adequate remedy at law.

71. CrossFit's conduct demonstrates an intentional, willful, and malicious intent to trade on the goodwill associated with Alvies, to the great and irreparable harm of Alvies.

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PRAYER FOR RELIEF

WHEREFORE, Counterclaimant prays for judgment against Counter-Defendants as follows:

1. For the declaratory relief sought by Counterclaimant in her First Cause of Action;
 2. That the Court enter a judgment finding that Counter-Defendants have violated California Business and Professions Code section 17200;
 3. In the alternative to the affirmative defenses asserted by Alvies in her answer to the Complaint, that the Court enter a judgment finding that Counter-Defendants have engaged in False Advertising in violation of 15 U.S.C. § 1125(a);
 4. That the Court award Alvies her costs in this action, including reasonable attorneys' fees and expenses, pursuant to 17 U.S.C. § 512(f) and 15 U.S.C. § 1117(a); and
 5. That the Court order such other relief as it determines is just and proper.

Respectfully submitted,

DATED: September 16, 2013

KRONENBERGER ROSENFELD, LLP

V.A.Sel

Virginia Sanderson

Attorneys for Defendant Jenni Alvies

JURY DEMAND

Pursuant to Federal Rule of Civil Procedure 38, Defendant respectfully demands that this action be tried to a jury of the maximum number allowable by law, on all issues so triable.

Respectfully submitted,

DATED: September 16, 2013

KRONENBERGER ROSENFELD, LLP

V. R. Bal

Virginia Sanderson

Attorneys for Defendant Jenni Alvies